

Xiphos

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Qualified immunity for shooting driver fleeing with officer on the running board

After seeing Thomas leaving a house known for drug trafficking, an officer stopped him for traffic violations. Davis was a passenger in Thomas' car. Three of Thomas' minor children were in the backseat. The officer discovered that Thomas was the subject of outstanding arrest warrants. When the officer instructed Thomas to get out of the car, Thomas refused.

The officer reached inside the car, intending to unlock and open the door. Thomas accelerated and drove toward a freeway ramp. The officer jumped onto the vehicle running board and held on. The officer (and Davis) shouted for Thomas to stop. As Thomas continued toward the freeway, the officer drew his weapon and fatally shot Thomas. The car came to a stop.

Davis and Thomas' children sued, alleging excessive force. The plaintiffs alleged that the officer caused the danger by jumping on the running board of the vehicle. Instead, they alleged, the officer should have made the better decision to let Thomas get away.

The officer asked the court to apply qualified immunity and dismiss plaintiffs' lawsuit. "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments." *Ashcroft v. al-Kidd*, 131 S.Ct. 2074 (2011). Once a defendant officer invokes qualified immunity, the burden shifts to the plaintiff to show that the court should not apply qualified immunity and dismiss the claim. To determine whether an officer is entitled to qualified immunity the court considers two questions. First, whether the plaintiff has alleged a violation of a constitutional right. Second, whether the officer's action was objectively reasonable under clearly established law at the time the conduct occurred. The court must determine the reasonableness of the use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Plumhoff v. Rickard*, 134 S.Ct. 2012 (2014).

It isn't enough for a plaintiff to allege that the officer could have made a better choice or could have used some other tactic that might not have caused injury. In *Thompson v. Mercer*, the court noted that the "question is not whether the force would have been avoided if law enforcement had followed some other police procedures" but rather the court must decide "regardless of what had transpired up until the shooting itself ... whether the officer had reason to believe, at that moment, that there was a threat of physical harm" (762 F.3d 433 (2014)). Shooting at or from a speeding car is often part of exciting chase scenes in cop movies. In the real world, police almost never shoot from a moving car and controversy often follows when officers shoot at moving vehicles. National attention was recently

focused on Denver, where officers fatally shot 17-year-old Jessica Hernandez, who was driving an allegedly stolen car. An officer suffered a broken leg during the confrontation. In 2011, officers in Miami fired 116 rounds at a car, killing the driver and wounding four bystanders. In the past few years, agencies in Los Angeles, Albuquerque, Cleveland, Anchorage, Pittsburg and other major cities have tightened restrictions on shooting at moving vehicles.

Lexipol's Use of Force Policy recognizes that "Shots fired at or from a moving vehicle are rarely effective" and counsels officers to "only discharge a firearm at a moving vehicle or its occupants when the officer reasonably believes there are no other reasonable means available to avert the threat of the vehicle, or if deadly force other than the vehicle is directed at the officer or others." Police force experts agree that, whenever possible, an officer should move out of the path of an oncoming vehicle. Shooting to mechanically disable a moving vehicle is rarely successful and carries significant risk.

The appellate court upheld the grant of qualified immunity for the officer and dismissed the lawsuit against the officer and against the Fort Worth Police Department. The court observed that the plaintiffs' claim that "the officer could have moved away from the car is, unfortunately, a suggestion more reflective of the 'peace of a judge's chambers' than of a dangerous and threatening situation on the street." Officers and departments should view this case—and many similar cases—as a stark reminder that policy and training should prepare the cop on the street with alternative tactics to shooting at a moving vehicle whenever reasonably possible. *Davis v. Romer*, 2015 WL 409862 (5th Cir. 2015).

Dog's failure to alert does not defeat probable cause to search

An officer stopped Morris for following too closely. As the officer spoke with Morris, he could smell marijuana. The officer spoke separately with Morris and his passenger, who gave inconsistent accounts of their travel plans. The officer noted other drug trafficking clues, including use of a rental car, hollowed out cigars and numerous empty energy drink containers. The officer called for a drug detector dog team.

The dog failed to give an indication of the odor of controlled substances. The handler explained that the dog seemed to be distracted and annoyed by the falling rain. Relying on his training as an interdiction officer and his observation of trafficking clues, the officer searched the car. He found a bag of Ecstasy tablets in the trunk.

Morris claimed that the detector dog's lack of a change of behavior indicating the odors of drugs mitigated the probable cause to search the car. Courts have disagreed about how to treat the negative results of a detector dog sniff. However, most courts recognize that even dogs have bad days and are not infallible. See:

- *United States v. Davis*, 430 F.3d 345 (6th Cir. 2005): There is "a near universal recognition that a drug-sniffing dog's failure to alert does not necessarily destroy probable cause."
- *United States v. Ramirez*, 342 F.3d 1210 (10th Cir. 2003): "We will not require investigators to cease an otherwise reasonable investigation solely because a dog fails to alert, particularly when we have refused to require that a dog sniff test be conducted at all."

- *McKay v. State*, 814 A.2d 592 (Md. App. 2002): “Dog’s failure to detect drugs does not automatically negate probable cause.”

In this case, the handler offered a reasonable explanation for the dog’s lack of indication. Thus, the court held that the officer properly searched the car. Two dissenting justices opined that the dog’s failure to alert meant that the officers did not have more than reasonable suspicion. The dissent asserted, “Once the drug dog failed to alert, the already marginal ‘objectively reasonable suspicion’ to search the vehicle and its trunk evaporated.” Particularly notable, however, is that the court *did not* discuss whether this particular dog was trained on the odor of Ecstasy. Most detector dogs are only trained to detect odors of methamphetamine, heroin, marijuana and cocaine. *State v. Morris*, 2015 WL 340805 (S.C. 2015).

No expectation of privacy in peer-to-peer network file sharing

Daniel Roberts used the Gnutella peer-to-peer network to share hundreds of images of child pornography with others on the network. Special agents of the Utah Attorney General Internet Crimes Against Children task force (ICAC) routinely patrol the web to thwart distribution of child pornography. An agent discovered that an IP address had hundreds of illegal images available for download. The agent learned that Roberts owned the suspect IP address and obtained a search warrant for Roberts’ home and computer.

Roberts was not home at the time that agents served the warrant. They spoke with him by phone and he agreed to meet. When he met with agents, he admitted that he had been collecting illegal images for some time, but started to delete them when the agents called him. Roberts gave his laptop computer to the case agent. The agent obtained a search warrant specifically for the laptop.

A computer forensic examiner found video and photo images documenting sexual abuse and sexual exploitation of young children. Roberts was charged with 30 counts of sexual exploitation of a minor. Roberts claimed that the search was illegal because the images shared on the peer-to-peer network were discovered through advanced technology known as the Wyoming Toolkit. Roberts asserted that the agents should have had a warrant specifically authorizing use of this tool.

Roberts filed a motion to suppress the evidence from his laptop and to force the state to reveal all of the inner workings of the Wyoming Toolkit. Such a disclosure would not likely have helped Roberts, but would have been invaluable to others’ efforts to freely trade illegal images without risk of being caught. The court held that using the Wyoming Toolkit to disclose child pornography on peer-to-peer file sharing networks was not a search under the Fourth Amendment. Roberts freely shared his files with others involved on the network. Thus, Roberts could not claim a subjective expectation of privacy in those files. *State v. Roberts*, 2015 WL 404627 (Utah 2015).

Asking officer to delete “naked pictures” meant consent to search phone images

Officers saw Montgomery leave a house known for drug sales and stopped him for a minor traffic violation as he turned into his driveway. Montgomery initially gave a false name. As an officer frisked

Montgomery, he pushed the officer's hand away from his pocket. When the officer asked Montgomery about a bulge in his pocket, he admitted that he was holding cocaine. The officer arrested Montgomery.

Montgomery consented to a search of his house. Officers found no contraband other than a pipe and a spoon with some residue. Montgomery agreed to give up his supplier's name in exchange for an officer helping him delete "naked pictures" on his cell phone that he did not want his father to find. Montgomery asked several times that the naked pictures be deleted. When the officer followed Montgomery's instructions, he saw images of child pornography. The officer stopped viewing.

Montgomery was convicted of possession of child pornography and sentenced to eight years in prison. Montgomery appealed, claiming that the pictures were discovered during an unlawful warrantless search. Montgomery claimed that he would not have been concerned about his father finding his naked pictures if he had not been arrested, and that he would not have been arrested if he had not admitted that he had cocaine, and that he would not have admitted that he had cocaine if he had not been frisked without any basis to believe that he was armed.

The prosecution claimed that there was no constitutional violation, but even if there was, the taint was purged by Montgomery's consent—in the form of asking the officer to delete naked pictures. The court considered whether Montgomery's consent was independent of the allegedly unlawful frisk. To determine whether consent is independent of an alleged illegality, the court examines 1) the temporal proximity of the illegal conduct and the consent; 2) the presence of intervening circumstances; and 3) the purpose and flagrancy of the initial alleged misconduct. The court held that Montgomery's repeated requests to sanitize the phone's naked picture library constituted an independent act, purging the taint of the possibly improper frisk. *United States v. Montgomery*, 2015 WL 390156, (5th Cir. 2015).

Law Enforcement Camera-based Systems Symposium

Lexipol Senior Legal Advisor and Vice-President Ken Wallentine will present at the first annual Law Enforcement Camera-based Systems Symposium and will be available to answer participants' questions about legal and policy issues related to camera-based systems.

The symposium will focus on law enforcement camera-based systems (e.g. body worn cameras, UAV's, ALPR, jail cameras, etc). The primary focus of the inaugural symposium will be on body worn cameras, storage, First Amendment, redaction, release, policy, and other topics listed below. Symposium session topics include:

- Civil liberties and privacy concerns
- Legislative update (state and federal)
- Grant opportunities for body-worn cameras
- Best practices policies for camera activation, downloading, retention, etc.
- Navigating potential collective bargaining/labor concerns
- Training to mitigate potential HIPAA issues
- Identifying First Amendment concerns (what can be recorded and then released?)
- Handling Freedom of Information Act and state public records requests

- Maintaining evidence credibility (spoliation, retention, redaction issues),
- Storage, download and bandwidth worries (1st and 2nd tier storage, hybrid, etc.)
- Cloud-based solutions
- DOJ consent decrees requiring body-worn cameras
- Report writing concerns (view the video before or after writing reports)
- Internal Affairs, workers comp, other non-prosecutorial use of video
- How body-worn cameras might actually inhibit investigations
- Cameras and their impact on officer productivity
- Public Information Officer (PIO) training about cameras
- Hacking concerns
- Geo-fencing concerns for law enforcement agencies
- Criminal prosecution, discovery, spoliation issues

For additional symposium information, visit: www.ipicd.com/ceer

Connect with *Xiphos* editor and Lexipol Senior Legal Advisor Ken Wallentine on LinkedIn for more recent updates and for information about timely topics of interest to street cops and administrators.

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